United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2370

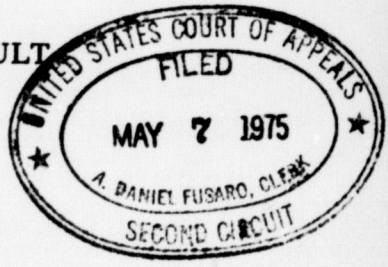
In the United States
Court of Appeals for the Second Circuit

No. 74-2370

GERARD and GEMMA BRAULT

v.

TOWN OF MILTON



ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF VERMONT
FOR EN BANC CONSIDERATION

BRIEF FOR APPELLANTS

John A. Burgess, Esquire
John A. Burgess Associates, Ltd.
Post Office Box 766
Montpelier, Vermont 05602
Counsel for Appellants

6

In the United States
Court of Appeals for the Second Circuit

No. 74-2370

GERARD and GEMMA BRAULT

v.

TOWN OF MILTON

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF VERMONT
FOR EN BANC CONSIDERATION

BRIEF FOR APPELLANTS

John A. Burgess, Esquire
John A. Burgess Associates, Ltd.
Post Office Box 766
Montpelier, Vermont 05602
Counsel for Appellants

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES — Continued

TABLE OF CASES — Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — Continued

FACTUAL SUMMARY

This case is brought against a Vermont Municipal Corporation (Appendix, Page 2), alleging violation of Federal rights under the Fourteenth Amendment (Appendix, Page 3). The amount in controversy exceeded Eighty Four Thousand Dollars ($84,000) (Appendix, Page 3). Jurisdiction is founded on 28 U.S.C. Section 1331(a) (Appendix, Page 2). The trial Court granted the defendant's motion to dismiss without a hearing on the amount in controversy. (Appendix, Page 1,6). The basis for the court's action was the fact that the defendant was a municipal corporation. (Appendix, Page 6). From the granting of the dismissal motion, plaintiff timely appealed. (Appendix, Page 6).

This Court's panel reversed. *Brault v. Milton*, 43 L.W. 2388 (1975). The Chief Judge, by order of April 17, 1975, pursuant to vote of the Court, granted en banc consideration.

ISSUES PRESENTED

In the order of the Court granting en banc consideration, the following issues were directed to be briefed:

I. The applicability of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), to violation of Fourteenth Amendment Due Process Rights;

II. The effect of 42 U.S.C. § 1983 (1970) upon Constitutionally-based causes of action against municipalities;

III. The applicability question of *Claim Preclusion* to this cause.

ARGUMENT

I. WHETHER BIVENS v. SIX UNKNOWN AGENTS[1] APPLIES TO VIOLATION OF FOURTEENTH AMENDMENT DUE PROCESS RIGHTS

[1] 403 U.S. 388 (1971).

Three questions are presented in considering the first issue suggested as a subject for briefing under the order of the Chief Judge relating to re-argument en banc.[2]

A. Whether a cause of action can be predicated on violations of the Constitution?

B. Whether such cause of action extends to violations of the Fourteenth Amendment?

C. Whether Federal Courts are vested with jurisdiction over such causes of action under 28 U.S.C. Section 1331(a)?

These issues are often times interlocked. However, clear analysis requires separate consideration.

A. A cause of action can be predicated on violations of the Constitution.

Since *Willey v. Sinkler*, 179 U.S. 58 (1900), and *Swafford v. Templeton*, 185 U.S. 1005 (1902), the Supreme Court has flirted with this issue. Many contend it was decided in *Bell v. Hood*, 327 U.S. 678 (1946). A careful reading of the opinion of Mr. Justice Black in that case shows that it decided only the jurisdictional issue under Section 1331(a).[3] He said that the Court:

> ". . . reserved the question whether violation of that command [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action which damages are consequent upon his unconstitutional conduct." *Bell v. Hood*, 327 U.S. 678.[4]

Limited to its facts and holding, *Bell* stands only for the proposition that the District Court must take jurisdiction under 28

---

[2] Dated April 17, 1975.

[3] At the time of *Bell*, 28 U.S.C. 41(1), since 1960, 28 U.S.C. 1331(a).

[4] It is relevant to note that on remand the District Court granted a motion to dismiss for failure to state a cause of action, "being of the opinion that neither the Constitution nor the statutes of the United States give rise to any cause of action in favor of plaintiffs upon the facts." *Bell v. Hood*, 71 F.Supp. 813, 820-821 (S.D. Cal. 1947).

U.S.C. Section 1331(a) to determine whether a cause of action has been stated.[5]

Several years later, a violation of the Constitution was alleged as the basis for a cause of action in *Wheelding v. Wheeler.*[6] The Court disposed of that case without reaching the Constitutional cause of action question by deciding that service of a subpoena to appear before a Congressional committee did not fall within the purview of the Fourth Amendment protections.[7]

Prior to either of these decisions,[8] Mr. Justice Holmes, writing for The Court, sustained a damage action under the Fourteenth Amendment with jurisdiction founded in the predecessor of 28 U.S.C. 1331(a).[9] The holding, however, is not as clear as might be desired.[10] The acorns of future Constitutional oaks were, nonetheless, firmly planted.

The first square decision of the Constitutional cause of action issue by the Supreme Court is in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.*[11] It is important to understand the context in which this case came before the Supreme Court.

This Court, on appeal from the District Court, held: "It is clear that the District Court had jurisdiction under 1331(a) to determine whether this complaint, unambiguously founded upon the Fourth Amendment, states a good federal cause of action."[12] This Court went on to affirm dismissal for failure to state a cause of action.[13]

The Supreme Court reversed this Court's decision as to statement of a claim saying:

---

[5] *Bell v. Hood*, supra, at 682.

[6] 373 U.S. 647 (1963).

[7] Id. at 649-650.

[8] *Nixon v. Herndon*, 273 U.S. 536 (1927).

[9] Judicial Code § 24(11), (12), (14) act of March 3, 1911 c. 231; 36 Stat. 1087, 1092 cited in the *Nixon* opinion at page 540.

[10] *Nixon v. Herndon*, op. cit. supra, at 540-541.

[11] 403 U.S. 388 (1971).

[12] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F.2d. 718 at 720 (CA 2, 1969).

[13] Id. at 720 (CA 2).

> *"having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, supra, pp. 390-395,* we hold that petitioner is entitled to recover money damages . . ." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. at 397; (emphasis added)

It is clear, that, at least as to some Constitutional Amendments, violation, in and of itself, states a cause of action.

B. A Constitutional cause of action arises from violations of the Fourteenth Amendment

We must now address the question of whether the scope of what I shall refer to as a "*Bivens* cause of action" is limited to the Fourth Amendment. It seems to plaintiff that to construe *Bivens* that closely, is to distort the Constitution and to emphasize disproportionately one Amendment and call its protections more vital than others.[14] Various District and Circuit decisions have clearly understood this and have extended the "*Bivens* cause of action" to non-Fourth Amendment violations.[15]

Specific holdings have extended the rationale to the Fourteenth Amendment. *Butler v. United States,* 365 F.Supp. 1035 (D.C. Ha. 1973); *Amen v. City of Dearborn,* 363 F.Supp. 1267, at 1270 (E.D. Mich. 1973); *Dupree v. Chattanooga,* 362 F.Supp. at 1136 (1973). *Amen* deals with Fifth and Fourteenth Amendment problems; *Butler* with First and Fourteenth Amendment causes of action. Of particular interest is an opinion of the United States District Court for the Northern District of Indiana, decided in 1973,[16] which specifically extended the *Bivens*

---

[14] In view of the dissenting opinions in *Coolidge v. NH.* 403 U.S. 443, (1971) that would not seem in keeping with current thought.

[15] *Sullivan v. Murphy,* 478 F.2d. 938 at 960 (D.C.Cir. 1973), Cert. Den. 94 Supreme Court 162 (1973) extended it to the Fifth Amendment as did *Gomez v. Wilson* 477 F.2d. 411, at 419 (D.C.Cir. 1973); *Moore v. Koelzer,* 457 F.2d. 892, at 894 (CA 3, 1972); and *Scheunemann v. United States,* 358 F.Supp. 875 (N.D. Ill. 1973). The District Court in Rhode Island in a 1973 case, *James v. United States,* 358 F.Supp. 1381, at 1386-1387, indicated in Obiter that both the Fifth and Eighth Amendments fell within the purview of a *Bivens* cause of action.

[16] *Noe v. County of Lake,* Civil No. 73 H 157 (Opinion attached. Appendix 1).

cause of action to the Fifth, Sixth, Eighth, and Fourteenth Amendments dealing with property right deprivations by municipal entities. The same reach toward municipal responsibility is reflected in *Dupree*.

Some may contend that the Fourteenth Amendment is not self-executing but requires Congressional implementation.[17] That argument would be persuasive except for long and distinguished judicial history to the contrary. It has long been the prerogative of the courts to, without legislative authorization, grant Fourteenth Amendment based equitable relief,[18] and declaratory judgments.[19] American jurisprudence is replete with judicial creation and implementations of remedies.[20]

The practice is of English origin. In 1854, the Kings Bench, when confronted with a seaman's action for a shipowner's failure to provide adequate medication, did not hesitate, reviewing common law precedent, to find a private remedy for breach of a public duty of statutory origin.[21] The approach of finding private remedies to sanction statutory breaches was approved by this Court, speaking through Judge Learned Hand in *Reitmeister v. Reitmeister*.[22] The Supreme Court in 1964 applied that theory to implement a private remedy for violations of the Securities Exchange Act of 1934[23] in *J. I. Case Co. v. Borak*.[24] Can it be credibly argued that the Federal Courts must be less flexible in remedying Constitutional wrongs than statutory violations? After the most exhaustive study, one scholar has concluded that the Bill of Rights deserves at least as much implementation as the Securities Act of 1934.[25]

---

17 For discussion of this concept, see 57 Cal. L. Rev. 1142 at 1169-1172.

18 See *Brown v. Board of Education*, 347 U.S. 483 (1954); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

19 *Lee v. Washington*, 390 U.S. 333 (1968).

20 For exhaustive discussions of the history of this, see: Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. Pa. L. Rev. 1; Hill, *Constitutional Remedies*, 69 Columbia L. Rev. 1109.

21 *Couch v. Steel*, 118 Eng-Rep. 1193 (K.B. 1854).

22 162 F.2d. 691, at 694 (CA 2, 1947).

23 15 U.S.C. § 78 n(a).

24 377 U.S. 426 (1964).

25 Katz, op. cit. supra, at 33.

C. Federal Courts are vested with jurisdiction of Constitutional torts

We must now address the question of whether 28 U.S.C. Section 1331(a) cloaks the Federal Courts with jurisdiction of a "*Bivens* cause of action."[26] It is clear from the majority opinion of Mr. Justice Black in *Bell*,[27] that he was not troubled by asserting 1331(a) jurisdiction if a cause of action could be found to have existed. The majority opinion in *Bruno v. City of Kenosha*,[28] as well as the concurring opinion by Mr. Justice Brennan,[29] clearly indicates the only possible question concerning 1331(a) jurisdiction is whether or not the jurisdictional amount is met.

The clearest statement of the issue to be considered when a "*Bivens* cause of action" is alleged, is by Mr. Justice Brennan concurring in *Bruno* when he said:

> ". . . if appellees can prove their allegation that at least $10,000 is in controversy, then Section 1331 jurisdiction is available, [citations omitted], and they are clearly entitled to relief."[30]

Prior to *Bruno*, but after *Bivens*, the Third Circuit had no reservations about finding 1331(a) jurisdiction of a Constitutional tort claim brought against individual defendants.[31] This court did not hesitate in the original *Bivens* decision on the 1331(a) jurisdictional problem.[32] It seems only to cause concern when a municipal defendant, such as the instant Appellee or the Amicus

---

[26] Since Plaintiff has not alleged jurisdiction based on 28 U.S.C. Section 1343, that will not be argued here. It is, however, urged that this section as well as 1331(a) arguably gives jurisdiction to a *Bivens* cause of action. See Bodenstiner, *Federal Court Jurisdiction of Suits Against "Non-persons" for Deprivation of Constitutional Rights*, 8 Valparaiso Law Rev. 215, pp. 229-234.

[27] *Bell v. Hood*, supra.

[28] 412 U.S. 507 at 514 (1973).

[29] Id. at 516.

[30] It should be noted that the motion to dismiss in this case is the only pleading filed and does not challenge the monetary aspect of the jurisdictional allegations. Appendix, pp. 4-5.

[31] *U.S. Ex Rel Moore v. Koelzer*, 457 F.2d. 892 (CA 3, 1972).

[32] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F.2d. 718, at 720 (1969).

City of New York, are involved. However, as noted by Mr. Justice White:

> "A city, town or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or *deny due process of law.*"[33] (emphasis added.)

The Fifth Circuit, following this rationale, has found justification in Madison's writings[34] to utilize ". . . the power vested in this court to check an abuse of state or municipal power."[35] This court is asked to do no more; the Constitution requires no less.

II. THE EFFECT OF 42 U.S.C. SECTION 1983 UPON CONSTITUTIONALLY BASED CAUSES OF ACTION AGAINST MUNICIPALITIES

In considering this subject it is necessary to review historically the various enactments which make up the total fabric of the rights under consideration. The Fourteenth Amendment was ratified and proclaimed effective July 28, 1868.[36] 42 U.S.C. Section 1983 was adopted in substantially its present form by Congress in 1871.[37] It was in fact "modeled" on Section 2 of the Civil Rights Act of 1866.[38] It was part of a fabric of post Civil War enactments:

> "offering a uniquely Federal remedy against incursions under the claimed authority of State law upon rights secured by the Constitution and laws of the nation."[39]

---

[33] *Avery v. Midland County*, 390 U.S. 474, at 480 (1967).

[34] Madison, *The Federalist Papers*, No. 48.

[35] *Hawkins v. Town of Shaw*, 437 F.2d. 1286, at 1292, (CA 5).

[36] See Proclamations of the Secretary of State of the United States, 1868.

[37] 17 Stat. 13.

[38] 14 Stat. 27. See also *Mitchum v. Foster*, 407 U.S. 225, at 238, note 27 (1972).

[39] *Mitchum v. Foster*, supra, at 239.

In 1888, the Congress first promulgated the antecedent of 28 U.S.C. Section 1331.[40] Substantially in its present form, it was adopted as Section 24 Paragraph 1 of the Statutes of 1901[41] and was codified in 1911 as part of the judicial code. It is interesting to note that in 1911, 28 U.S.C. Section 1343 appeared in its final form, substantially as we have it today.[42] It cannot be presumed that Congress did not understand the interrelated nature of either the "post Civil War actions" or the Judiciary Act of 1911.[43] The Congressional debates relating to the Judiciary Act of 1911 and its antecedents clearly reflect a Congressional understanding that they were dealing in the area of civil rights and personal liberties.[44]

It is now axiomatic to our law that 28 U.S.C. Section 1983 was intended to protect individuals from the acts of other individuals violating Constitutional protections.[45] It was clearly not intended to protect individuals from intrusion by government entities.[46] The question then is whether, having made the individual agents of government responsible, the Congress intended the government entity to trample unfettered on Constitutional protections without redress by citizens.

Had the Congress promulgated only Section 1983, that argument might have merit. To accept that argument, however, the later adoption of Section 1331, which no one has ever maintained was implementive of Section 1983, was a waste of Con-

---

[40] Act of August 13, 1888; chap. 866 (25 Stat. at L 433).

[41] 36 Stat. 1901.

[42] Act, March 3, 1911, Chapter 231, Section 24, Para. 1 became 28 U.S.C. Section 1331. Act of March 3, 1911, Chapter 231 Section 24 Paras. 12, 13, and 14 became 28 U.S.C. Section 1343 (1)(2)(3). See also *United States v. Sayward*, 160 U.S. 493 at 498, (1895).

[43] *United States v. Congress of Industrial Organization*, 335 U.S. 106 (1948). (In many decisions legislative debates are regarded as properly taken into consideration). *Blake v. McKim*, 103 U.S. 336 (1880) (Congress aware of judicial construction of statute).

[44] Congressional Record, March 23, 1910, pp. 3596-3599.

[45] *Monroe v. Pape*, 365 U.S. 167 (1961); *Ex Parte Virginia*, 100 U.S. 339, at 346, (1879).

[46] *Monroe v. Pape*, supra; *Bruno v. City of Kenosha*, supra.

gressional effort, rather than a step which broadened protections under the Fourteenth Amendment.[47]

In Argument 1, we have established the Constitutional cause of action and its utilization in equitable and declaratory instances.[48] Since the Congress has clearly been held to have made a municipality's servants liable and the municipality itself subject to equitable jurisdiction, there being no restriction on the face of the statute, logic compels the conclusion that the effort, begun when the Fourteenth Amendment created its various causes of action and applied to municipal employees under Section 1983, came full circle in creating a jurisdiction over the municipality itself in the adoption of the antecedent of 28 U.S.C. Section 1331.

III. WHETHER CLAIM PRECLUSION APPLIES IN THIS CAUSE

Claim Preclusion in civil rights litigation is an area in which the Supreme Court of the United States has not definitively spoken.[49] It is clearly one in which the circuits are in seeming conflict.[50] A lawyer launching his client's cause in this area must chart a course by uncertain, shifting, stars. We must, therefore, first establish general principles and then study their application to this specific field.

The general rule expressed by the United States Supreme Court in 1933 is that the result:

> ". . . depends upon whether the question arises in subsequent action between the same parties upon the same claim or demand or upon a different claim

---

47 As has been pointed out in Argument 1, supra, it is assumed in this argument that the Fourteenth Amendment, as well as the Fourth Amendment, gives rise to a cause of action for its breach. We here discuss only, as directed by the Court, the interrelationship between this cause of action and Section 1983.

48 See notes 18, 19, 20, supra.

49 *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

50 Compare *Lombard v. Board of Education*, 502 F.2d. 631 (CA 2, 1974), with *Frazier v. East Baton Rouge Board of Education*, 363 F.2d. 861 (CA 5, 1966).

> or demand. In the former case, a judgment upon the merits is an absolute bar to the subsequent action in the latter. The inquiry is whether the point or question to be determined in the latter action is the same as that litigated and determined in the original action."[51]

Some of the circuits speaking of preclusion, without specific application to civil rights, have variously expressed the rule:

> "The judgment in that case is, therefore, based upon a different cause of action and is not, in the strict sense of the word, res judicata, even though between the same parties. In such circumstances, a prior judgment operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment was rendered." *Aetna Life Ins. Co. v. Martin*, 108 F.2d 824, 826 (CA 8, 1940);

> "A former judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or cause of action it operates as an estoppel or conclusive adjudication only as to such issues in the second action as were actually litigated and determined in the first action." *Lorber v. Vista Irr. Dist.*, 127 F.2d. 628, 634, (CA 9, 1942).

The leading scholarly article on the subject clearly indicates that a flexible approach, considering and weighing various factors, is to be desired.[52]

If particular interest is the theory advanced by Vestal that civil rights is an area unique to the Federal Courts.[53] In speaking of the anti-trust jurisdiction and its uniqueness to the Federal system, this court said:

> "In the case at bar it appears to us that the grant

---

[51] *Tait v. Western Maryland Rail Company*, 289 U.S. 620, at 623 (1933); Cf. Moore's *Federal Practice, Res Judicata*, para. 0. 450 [1].

[52] Vestal, *State Court Judgment as Preclusion in Section 1983 Litigation in a Federal Court*, 27 Okla. L. Rev. 185.

[53] Op. cit. pp. 208-212.

> to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any pre-judgment elsewhere; at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that makes up the wrong . . . There are sound reasons for assuming that such recovery should not be subject to the determinations of state courts . . . Obviously, an administration of the Acts, at once effective and uniform, would best be accomplished by an untrammeled jurisdiction of the federal courts."[54]

Certainly, Constitutional rights are no less uniquely a Federal concern.

The various factors and contentions that can be brought to bear on this issue in a civil rights context were well analyzed by Mr. Chief Justice Burger and Mr. Justice White in a dissent from the denial of certiorari in *State Board of Dentistry v. Mack*.[55] They analyzed the alternative arguments as follows:

1. Federal courts may not determine issues previously submitted and determined by a state court; or

2. The normal rules concerning state court finality are not applicable in 1983 actions; or

3. Compelled presentment of a Federal claim to a state court as a defendant alters the res judicata principle.

It is of interest in applying this triple-fold analysis to the instant case to point out that the issue of Constitutional liability was not previously submitted to the State court.[56] Further, as indicated above, there are special rules and special circumstances that must apply to unique Federal remedies. It is, lastly, of great significance to note that the case was brought by the Appellee, Town of Milton, in State court on an equitable claim for injunction. It was so litigated in the first instance.[57]

---

[54] *Lyons v. Westinghouse Electric Corp.*, 222 F.2d. 184, 189 (CA 2, 1955).
[55] 401 U.S. 960 (1971).
[56] *Brault v. Milton*, 129 Vt. 431 (1971). 282 A. 2d. 681.
[57] Op. cit.

Damages for wrongful injunctive relief were not available until remand by order of the Vermont Supreme Court.[58] After that determination, the sole question was the accessibility of damages under the Vermont Statute relating to wrongful issuance of injunctions.[59] It has been held, and it is urged to be the better view, that when the Federal question was not available to be raised there can be no preclusion.[60] There was, therefore, no opportunity to present a "specially protected Federal interest."[61]

The specific application of these general principles in the area of Constitutional rights litigation must begin with the nature of such litigation, which has been called by the Supreme Court "supplementary to the state remedy."[62] This court is not presented with an Appellant who litigated a Constitutional issue before a state court of competent jurisdiction and seeks his "Two bites of the cherry."[63]

The reference to this court's opinion in *Lombard* leads us directly from a general analysis to a specific reading of the precedent of this court in this area. No one can seriously doubt that *Lombard*, supra, unless distinguished or overruled, is dispositive of this issue, as approved, per curiam, in *Newman v. Board of Education*.[64] For the reasons pointed out above it is urged that the case is not distinguishable on its facts. The instant case makes out an even stronger basis for non-preclusion since the federal issue was not even available in state litigation[65] under the equitable theory of the Town suit and the restrictive nature of the rule under which damages were considered.[66]

---

[58] Op. cit. at 432. The order stated: "Decree reversed and cause remanded for purposes of assessing damages pursuant to terms of injunction bond and 12 V.S.A. § 4447."

[59] 12 V.S.A. § 4447 provides that when an injunction has been dissolved by final judgment in favor of the enjoined party, that party shall be entitled to recover the actual damages caused by the wrongful issuance of the injunction.

[60] *Robins v. Police Pension Fund*, 321 F.Supp. 93 (S.D. N.Y., 1970).

[61] *State Board of Dentistry v. Mack*, supra, note 55.

[62] *Monroe v. Pape*, 365 U.S. 167, at 183 (1961).

[63] *Lombard v. Board of Education of the City of New York*, supra, note 50.

[64] ____ F.2d. ____, slip op. 1163 (CA 2, January 6, 1975).

[65] *Brault*, supra, notes 56-58.

[66] *Brault*, supra, note 59.

It is of some interest to note that the *Lombard* case has been the subject of recent law review case notes.[67] Both articles review that decision more exhaustively than space here allows, with the critical and jaundiced eye typical of academic analysts. It is of considerable persuasive impact that the Harvard article's most significant comment castigates the *Lombard* decision for disregarding 28 U.S.C. Section 1738.[68]

Assuming without conceding, the validity of this view, we have turned our search to the law of the State of Vermont, which, regarding preclusion, was first formulated in *Gray v. Pingree*, 17 Vt. 136 (1845). Therein, the Vermont Supreme Court held that only issues "actually litigated" were barred from subsequent action. The Vermont Court has consistently reaffirmed that position over the ensuing 130 years.[69]

It is, therefore, submitted that, what I shall call, "the *Lombard* flexible approach" has substantial jurisprudential merit.[70] It is, with no contrary Supreme Court opinion, the binding precedent in this circuit. Due to the particular posture of this case's course in State court, it should be followed. The most significant scholarly criticism of the opinion would suggest this court apply the State Preclusion Rule.[71] The adoption of Vermont's rule would lead to an identical result that is obtained by following this Court's own precedent.

CONCLUSION

Therefore, because the Constitution creates a cause of action, which is enforceable in the courts under 28 U.S.C. 1331

---

[67] 43 Fordham L. Rev. 459 (1974); 88 Harv. L. Rev. 453 (1974).

[68] That statute in part provides: "Judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

[69] See *Perkins v. Walker*, 19 Vt. 144 (1847); *Tudor v. Kennett*, 87 Vt. 99, 88 At 520 (1913); *Spaulding's Administrator v. Woolley's Estate*, 96 Vt. 66, 117 At 373 (1922); *Makela v. State of Vermont*, 124 Vt. 407, 205 A. 2d. 813 (1964); *Avery v. Bender*, 126 Vt. 342, 230 A. 2d. 786 (1967).

[70] See Vestal, supra, note 52.

[71] See Harvard, supra, note 67.

(a), the original panel discussion should be affirmed.

There are no preclusion issues presented on this record which would compel a reversal of the *Lombard* rule as applied by the panel. The entry, therefore, must be judgment of the Federal District Court reversed, cause remanded.

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

TERRY NOE, et al.	)	
	)	
v.	)	CIVIL No. 73 H 157
	)	
THE COUNTY OF LAKE, et al.	)	

ORDER

All defendants, with the exception of James J. Richards, have moved to dismiss the complaint on various grounds. Having considered the briefs of the parties and the arguments of counsel, the Court concludes that the complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1983 against the County of Lake. However, the complaint does state a claim against the County under the Constitution, and jurisdiction is adequately alleged under 28 U.S.C. § 1331. Accordingly, the motion to dismiss the County of Lake is DENIED.

Jurisdiction over the remaining defendants other than Pruitt and Krochta exists under 28 U.S.C. § 1343(3) and (4), and the complaint states a cause of action under § 1983. Accordingly, the motions to dismiss the complaint as to defendants Pruitt and Krochta are GRANTED, and the motions are DENIED as to all other defendants.

/s/ GEORGE N. BEAMER
United States District Judge

Enter: November 1, 1973.

MEMORANDUM

Plaintiffs, allegedly representatives of a class of indigent persons who have or will have a public defender appointed to

represent them before the Lake Criminal Court, brought this action for declaratory and injunctive relief under 42 U.S.C. § 1983, 28 U.S.C. § 2201-2202, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1343(3) and 1343(4). Joined as defendants are the County of Lake, the Lake County Council and its individual members who appropriate funds for the defender system, the Lake County Auditor and members of the Board of Commissioners of Lake County, the County Sheriff, who executes the orders of the County Council, and the County Clerk. A second group of defendants consist of the Chief Judge of the Superior Court, the Chief Judge of the Criminal Division of the Superior Court, and the Commissioners of the Lake Criminal Court. All of the defendants have been named in both their individual and their representative capacities.

Plaintiffs' complaint alleges that they have received inadequate representation from the Lake County Public Defender system as a result of excessive caseloads, lack of investigative services, lack of financial resources for discovery, lack of adequate secretarial and clerical assistance and lengthy delay between arrest and appointment of a public defender. They contend that this system violates their rights to adequate legal representation and speedy trial, reasonable bail, jury trial and freedom from self-incrimination. They seek injunctive relief to require the institution of a system providing representation which is adequate, and ordering the Criminal Division of the Lake County Superior Court to hold hearings to determine whether prisoners should be released, have charges dismissed, or have bail reductions. Plaintiffs have voluntarily dismissed the original claim for damages against all defendants other than the County.

The first group of defendants have moved to dismiss the allegation of a class action on the ground that the questions of law and fact raised by the complaint are peculiar to the named plaintiffs and that different proof would apply to the claims, defenses and damages of each, including the contribution of

plaintiffs to any delay in the proceedings.

The Court finds that the allegations of the complaint establish that the class of indigent persons who have or will have a public defender appointed to represent them before the Lake Criminal Court is a proper class under Fed. R. Civ. P. 23(a) and that the class is an appropriate one under Rule 23(b)(2). The defendants' challenge to the class is based on the contention that adequate representation is necessarily an individual determination on the facts pertaining to each plaintiff. However, plaintiffs' complaint is that there is an absence of sufficient resources to support a system of adequate representation, and this ground is generally applicable to the entire class regardless of differences in the individual representation provided, or the contribution of plaintiffs to delay. Although not relied upon by defendants, their arguments are based upon a rationale which the Supreme Court adopted in holding recently that when a state prisoner challenges the fact or duration of his imprisonment and by way of relief seeks a determination that he is entitled to immediate or speedier release, his sole federal remedy is by writ of habeas corpus. *Preiser v. Rodriguez*, 93 S. Ct. 1827 (1973). Insofar as the complaint seeks such relief, it is now obvious not only that a class action is not maintainable, but that the sole remedy for the relief is in federal habeas corpus, with its requirement of exhaustion of state remedies. However, the Court in *Preiser* was careful to note that if both the condition and the duration of the confinement are challenged, the former can be litigated in an action under § 1983. Insofar as the present complaint challenges the financial resources allocated to the Lake County public defender system, and the systemic delay in appointment of defenders, it attacks neither the fact nor the duration of any prisoner's confinement, but rather seeks to relieve conditions which operate to deprive a class of defendants in state court of the adequate assistance of counsel. As such, it is the opinion of the Court that the exercise of jurisdiction is proper and the class is properly constituted.

The first group of defendants argues for dismissal of the

complaint on the grounds that the complaint is devoid of any factual allegations that defendants were acting in an individual capacity, and that the complaint fails to allege specific facts showing that these defendants have deprived plaintiffs of any constitutionally protected rights since they are not responsible for the appointment of counsel for defendants or for the inadequacies in that representation.[1] The second group of defendants, with the exception of Richards, has moved to dismiss the complaint on the ground that these defendants in their capacities as members of the judiciary are immune from suit.

Although not raised by the defendants' motions, the recent cases of *Moor v. County of Alameda*, 93 S. Ct. 1785 (1973), and *City of Kenosha v. Bruno*, 93 S. Ct. 2222 (1973), establish that the complaint fails to state a claim under § 1983 against the County. However, as plaintiffs emphasized in their supplemental brief, the complaint also alleges jurisdiction under 28 U.S.C. § 1331. Defendants have not challenged the existence of the requisite jurisdictional amount in their motion to dismiss, and the Court therefore cannot find a lack of jurisdiction over the County at this point in the proceeding. See *Hague v. C.I.O.*, 307 U.S. 496, 507-508 (1939). Jurisdiction over the other defendants clearly exists under 28 U.S.C. § 1343(3) and (4).

The argument of defendants directed to the naming of each official in his individual as well as official capacity is now moot because plaintiffs' claims for damages have been dismissed against all defendants other than the County. The first group of defendants argues that the complaint should be dismissed entirely against them because they have no "responsibility" for the determination of the amount of compensation for the services of public defenders and investigators or for the other actions referenced in the complaint. This argument is apparently based on Indiana statutes which provide for the fixing of compensation by the judges of the state court while imposing a mandatory duty

[1] The motion also contends that the complaint is not properly verified; defendants do not point out in what respect the complaint is improper, and the contention is therefore without merit. *See* Fed. R. Civ. P. 11.

upon the County Council to appropriate amounts set by statute for such purposes. Ind. Ann. Stat. §§ 4-5715, 4-5717 (Burns 1968 Repl.), I.C. 33-9-5-1, 33-9-7-1 (1971). Although this argument is in effect an assertion that there exists no state action by the first group of defendants which has had any effect upon plaintiffs, the Court need not reach the issue because the complaint alleges that "defendants have not appropriated sufficient resources for the public defender system." This is in effect an allegation of state *inaction* rather than action. The Court has no hesitancy, however, in finding that the complaint states a cause of action for such inaction when the defendants have a statutory duty to act and the constitutional violations alleged involve fundamental rights. Cf. *Lucas v. Wisconsin Electric Power Co.*, 466 F. 2d 638 (7th Cir. 1972), *cert. denied* 409 U.S. 1114; *United States ex. rel. Smith v. Twomey* (7th Cir., No. 73-1461, decided September 18, 1973). Although the County Council is the only representative of the County to which this finding applies, the County Auditor and the members of the Board of Commissioners of the County are proper parties because their joinder is required by statute to enforce any judgment against the County and afford complete relief to the parties. *See* Ind. Ann. Stat. § 26-528 (Burns 1970 Repl.); I.C. 17-1-24-27 (1971); Fed. R. Civ. P. 19. The propriety of the joinder of the County Sheriff is less evident; plaintiffs argue he is a proper party because he carries out the orders of the Council and has custody of some of the plaintiffs who may be required to appear in this Court. However, it is clear from the statute involved that there is no necessity for carrying out an order appropriating funds, and the Court would have adequate powers in the absence of joinder to compel the attendance of plaintiffs at any court proceeding. The main reason asserted for joinder, possible release of the plaintiffs, is insufficient because of the Court's determination of lack of jurisdiction to grant such relief. Plaintiffs also assert in their brief that part of the final relief granted may include requiring the sheriff to notify the public defender when indigents are incarcerated to avoid the length of time between arrest and appointment of counsel. However, the complaint does not al-

lege that the sheriff has any responsibility for the appointment of counsel, and any relief designed to eliminate the delay between arrest and the appointment of a defender would necessarily be directed to the defendant judges rather than the sheriff. As to the County Clerk, plaintiffs contend it may be necessary to require the Clerk to give notice to the defender of court actions and to give priority to indigent cases on the court calendar. Nowhere in the complaint is there any allegation that the public defenders do not receive notice of court actions in indigent cases nor that the delay in indigent cases is a result of scheduling of cases by the Clerk. Rather, the complaint alleges that these results occur because of the inadequacies of the public defender representation.

Since the plaintiffs have dropped their claim for damages against the sheriff and the County Clerk and there is no possible injunctive relief which will apply to these two defendants, the complaint fails to state a claim upon which relief can be granted against the sheriff and the County Clerk, and they are not proper parties under Fed. R. Civ. P. 19-20.

The motion to dismiss filed by the remaining defendants on the ground of judicial immunity would appear to be foreclosed by the recent decision in *Littleton v. Berbling*, 468 F. 2d 389 (7th Cir. 1972) (appeal pending 409 U.S. 1033). Although the *Littleton* holding that state judicial officers are not immune from suit under § 1983 for injunctive and declaratory relief when class discrimination is alleged is cast in some doubt in light of the Supreme Court's decisions in *Moor* and *City of Kenosha*, the Court agrees with plaintiffs that jurisdiction is proper regardless of the continued viability of *Littleton* because the complaint is directed to administrative rather than judicial acts. See *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967); *Ex Parte Virginia*, 100 U.S. 339 (1879); *Green v. City of Tampa*, 335 F. Supp. 293 (M.D. Fla. 1971); *Bramlett v. Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969).

For the reasons stated, the motions to dismiss of defendants Pruitt and Krochta will be granted, and the complaint against

the County under 42 U.S.C. § 1983 will also be dismissed. In all other respects the motions will be denied.

JOHN A. BURGESS ASSOCIATES, LTD.
Lawyers

Box 766
Montpelier, Vermont 05602
802-223-2361

Counsel
John A. Burgess
J. Frederick Stone
Gilbert T. Normand

May 5, 1975

AIRMAIL, SPECIAL DELIVERY
REGISTERED MAIL

A. Daniel Fusaro, Clerk
Second Circuit Court of Appeals
Foley Square
New York, New York

Dear Mr. Fusaro:

Enclosed herewith for filing please find 25 copies of the Appellants' brief in the matter of Gerard and Gemma Brault v. Town of Milton, Docket No. 74-2370. Two copies of the same are being sent to Michael Ambrosio together with a copy of this letter, and to Matthew Katz, counsel for the Appellees.

Very truly yours,

JOHN A. BURGESS ASSOCIATES, LTD.

By: John A. Burgess
John A. Burgess

JAB/cjd

Enclosures

cc Michael Ambrosio, Esq.
Counsel of the City of New York
Municipal Building
New York, New York 10007

Matthew I. Katz, Esq.
85 South Prospect Street
Burlington, Vermont 05401